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Nos. 914, 916, 920

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

IN THE MATTER OF
THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, DEBTOR

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY
FIRST MORTGAGE 4% BONDHOLDERS COMMITTEE,
Petitioner,

MANUFACTURERS HANOVER TRUST COMPANY,
AS TRUSTEE UNDER THE
FIRST AND REFUNDING MORTGAGE OF THE DEBTOR,
Petitioner,

THE CHASE MANHATTAN BANK, N.A.
AS TRUSTEE UNDER THE
GENERAL INCOME MORTGAGE OF THE DEBTOR,
Petitioner,

RICHARD JOYCE SMITH, TRUSTEE OF THE PROPERTY
OF THE NEW YORK, NEW HAVEN AND HARTFORD
RAILROAD COMPANY, DEBTOR,
Respondent.

BRIEF OF RESPONDENT IN RESPONSE TO PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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December 12, 1969

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Petitioners in Nos. 914[1], 916[2] and 920[3] (the "Bondholders") seek the issuance of writs of certiorari to the

[1] The New York, New Haven and Hartford Railroad Company First Mortgage 4% Bondholders Committee ("Committee").

[2] Manufacturers Hanover Trust Company ("Manufacturers"), as trustee under the New Haven's First and Refunding Mortgage.

[3] The Chase Manhattan Bank, N.A. ("Chase"), as trustee under the New Haven's General Income Mortgage.

United States Court of Appeals for the Second Circuit to review appeals now pending before that court relating to the consideration that must be paid by Penn Central Company ("Penn Central") for the assets of The New York, New Haven and Hartford Railroad Company ("New Haven"). The New Haven has been in reorganization under Section 77 of the Bankruptcy Act since July 7, 1961 in the United States District Court for the District of Connecticut ("Reorganization Court"). Richard Joyce Smith, as Trustee of the property of the New Haven, is the sole respondent who fully supports the decision of the Reorganization Court. For the reasons hereinafter stated, he supports petitioners in their prayers for a writ of certiorari before judgment.

Providence and Worcester Railroad Company has also petitioned for certiorari in No. 918. Pursuant to Rule 24 of the Rules of the Court, Respondent hereby waives the right to file a brief in opposition. As the matter raised by Providence and Worcester has been consolidated in the Court of Appeals with the Bondholders' appeals, Respondent raises no objection to the Court granting the petition in No. 918 concurrently with the Bondholders' petitions.

On November 25, 1968, the Interstate Commerce Commission ("Commission") entered an order fixing the terms of the New Haven's inclusion in Penn Central,[4] based upon findings made by the Commission for the purposes of both Section 5(2)(d) of the Interstate Commerce Act and Section 77(d) of the Bankruptcy Act. The order (the "Fourth Supplemental Order"), which was accompanied by the

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[4] Joint Appendix of Bondholders (hereinafter cited "App") p. 218a. Penn Central was created by the merger of The New York Central Railroad Company into The Pennsylvania Railroad Company approved by orders of the Commission reviewed by the Court in 386 U. S. 372 (1967) and 389 U. S. 486 (1968). Under these orders, the New Haven's inclusion was required as a condition of such merger.

Commission's Fourth Supplemental Report, modified terms for inclusion fixed by the Commission in its Second Supplemental Order, dated November 16, 1967, that had been reversed by a three-judge court in the Southern District of New York,[5] and disapproved by the Reorganization Court,[6] as providing inadequate consideration for the New Haven's assets.

The Bondholders (and another) brought a proceeding in a three-judge court in the Southern District of New York to review so much of the Fourth Supplemental Order as was entered under the Interstate Commerce Act.[7] Upon certification by the Commission of its Fourth Supplemental Report as a plan of reorganization for the New Haven, a parallel proceeding was instituted in the Reorganization Court in which the terms of the consideration were reviewed under the Bankruptcy Act.

The Reorganization Court had previously indicated that, because of the New Haven's financial condition, it would not be permitted to borrow additional funds to continue its railroad operations beyond the end of 1968. In response, the Commission provided in the Fourth Supplemental Report that the transfer to Penn Central of the New Haven's assets and operations should be effected by January 1, 1969 upon payment of the consideration which the Commission had found to be fair and equitable, without prejudice, however, to the rights of the parties thereafter to seek

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[5] 289 F. Supp. 418 (1968).

[6] 289 F. Supp. 451 (1968).

[7] In the earlier proceeding in the three-judge court to review the Commission's Second Supplemental Report and Order, the United States took the position that the matters involved were wholly within the jurisdiction of the Reorganization Court. This contention, which was overruled at that time, was not subsequently renewed in connection with the Fourth Supplemental Report.

judicial review of the terms of inclusion.[8] The Commission approved such transfer as a "first step" in the plan of reorganization, whose other terms, relating to treatment of claimants, were also fixed and approved.

The Reorganization Court entered its Order No. 559 on December 24, 1968, approving the "first step" and ordering the Trustees to carry out the conveyance and receive the consideration fixed by the Commission, subject to a general reservation of jurisdiction to review the plan of reorganization, including objections already filed as to the amount of consideration.[9]

The three-judge court rendered an opinion on June 18, 1969 in which it found that the Commission's Fourth Supplemental Report undervalued the worth of the New Haven's assets in certain respects and that, as a consequence of various specified adjustments, Penn Central should be required to pay additional consideration, subject to computations required to be made by the Commission.[10] As directed by the three-judge court, the Commission submitted a form of decree, accompanied by its Fifth Supplemental Report, dated July 10, 1969 (modified August 26, 1969), and the three-judge court entered an order on September 11, 1969 in which, among other things, it required the consideration to be paid by Penn Central to be increased by approximately $1 million.

In the parallel proceeding, on May 28, 1969, the Reorganization Court filed its memorandum on the issue of price[11] in which it found that it could not approve the plan

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[8] App. 163a.

[9] App. 269a. One of the then two Trustees subsequently retired.

[10] App. 400a. There was a dissenting opinion which considered that substantial increases in the consideration would be required and, accordingly, would have remanded the case to the Commission.

[11] App. 277a.

of reorganization as being fair and equitable unless the consideration for the assets transferred to Penn Central was increased by approximately $29 million, or some $28 million more than was subsequently approved by the Commission and the three-judge court. On July 28, 1969, the Reorganization Court entered its order[12] returning the plan of reorganization to the Commission for the reasons stated in its May 28 memorandum.

There presently exist, therefore, conflicting decisions of two district courts of the same circuit, one entered under Section 5 of the Interstate Commerce Act and one entered under Section 77 of the Bankruptcy Act, as to the value of the railroad assets conveyed by the New Haven to Penn Central on December 31, 1968, and the price to be paid therefor. Both the three-judge court and the Reorganization Court recognized the difference which each had with the other, and each expressed the view that the matter would require resolution in this Court.[13]

The Bondholders have also taken appeals from the order of the three-judge court and have recently filed their jurisdictional statements with the Court.[14] These appeals should be heard by the Court together with the instant cases. Granting the petitions for certiorari before judgment would make joint consideration possible. Respondent submits that joint consideration of both sets of appeals is vital not only in terms of efficiency and economy of the Court's time but also, as a matter of substantial justice, in order to give the Court the benefit of the views expressed in the various opinions of the courts which have passed upon the question of consideration. It is recognized that joint consideration is, of course, possible whether certiorari is granted before or

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[12] App. 316a.

[13] App. 430a-431a; 315a.

[14] Nos. 915, 917 and 921.

after judgment by the Court of Appeals,[15] but Respondent considers that it is strongly in the public interest to have the cases decided on the merits as promptly as possible.

The reasons for such prompt, joint review are the following:

The public interest heretofore was found to lie both in continuation of rail operations and in protection of creditors' rights through inclusion of the New Haven in a trunk line system. The former objective having been fully accomplished, the latter objective should not be permitted to languish merely because of the disagreement over the quantum of consideration;

The tax consequences to the New Haven demand prompt conclusion of the reorganization; and

There is a substantial public interest in prompt determination of the apparent conflict between the two applicable statutes.

1. From the outset of the New Haven's reorganization, it was acknowledged by the Reorganization Court and the Trustees that survival of a major transportation system was at stake. However, with operations producing a substantial deficit in income available for fixed charges, an internal reorganization of the traditional type involving recapitalization of the corporate debt structure was clearly an inadequate device. The answer reached by the Trustees was that consolidation with a trunk line railroad was required. The merger application filed with the Commission in 1962 by the former Pennsylvania and New York Central Railroads made such consolidation a realistic goal.

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[15] In the response of Trustee Smith to the jurisdictional statements filed by the Bondholders in the three-judge court proceeding, in which he supports their position, he has requested that consideration on the merits be deferred by the Court until such time as it has the instant case before it.

Thereupon, the Trustees petitioned the Reorganization Court for authority to file a petition with the Commission pursuant to Section 5(2)(d) of the Interstate Commerce Act for compulsory inclusion of the New Haven's operations in the proposed merged company as a condition to approval of the merger. The Trustees made it clear that they considered such inclusion to be the most feasible method of protecting the value of the New Haven estate in the interest of the creditors, although it would entail the continuation of loss operations for a further period.[16]

The Reorganization Court and the Commission both found, in light of the position taken by the Trustees, that there was, in fact, an urgent public interest in preserving freight and passenger service in the New Haven's territory. Otherwise, the rights of the New Haven's creditors might have received a different resolution, possibly involving liquidation of the New Haven, long before now. The financial consequences of railroad operations for the additional 7½ years after the New Haven filed its bankruptcy petition have been net income deficits of over $116 million.

Although railroad operations were transferred to Penn Central a year ago, final determination of the rights of the New Haven's creditors remains unresolved. The effect of the conflict in decisions with respect to the consideration to be paid the New Haven is to continue the reorganization for a further indefinite period.[17]

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[16] The requested authority was granted by the Reorganization Court in its Order No. 109, dated June 19, 1962.

[17] The Reorganization Court has already indicated its approval, with some modifications not here pertinent, as to the nature and form of the plan of reorganization contained in the Commission's Fourth Supplemental Report, subject to final determination of the instant questions and further consideration of the plan by the Commission in the light of such determination. Formal approval by the Commission and the Court must, accordingly, await resolution of the pending questions as to consideration.

It is significant that under present circumstances there is no way for persons interested as claimants in the reorganization to reach knowledgeable decisions as to the value of their interests. Although it may be characteristic of reorganizations that certain of the information normally employed in evaluating security interests in a company is unavailable, the problem for the New Haven's creditors arises in a unique and perplexing manner. Here, the manner of treatment of claimants provided in the reorganization plan has now been essentially fixed, but the question of the size of the bankrupt's estate remains unknown. Typically, the general size of the bankrupt's estate is known and the controversies arise in the valuation of the respective equities in the estate, dealing with such questions as priorities and the nature of the plan. Because the value of the estate itself is the unknown, and the range of possible values based on the conflict in decisions of the two district courts is so broad, there is a material frustration of the freedom of transfer of securities on an intelligent basis.

The Commission and the Reorganization Court have found that no class of claimant junior to the New Haven's two outstanding mortgage bond issues has an equity.[18] The junior of these bonds is recognized in the plan to have a potential equity which would be compensated by warrants entitling the holders to "buy their way" into the reorganized company. The senior bonds have a claim in reorganization of approximately $100 million. Thus, the disagreement between the two district courts involves consideration which amounts nearly to 30% of the claims of the senior mortgage bonds. In addition, the Bondholders make further claims that are three-fold this difference. Both these mortgage bond issues continue to be listed and traded on the New York Stock Exchange.

This valuation problem forces a public market, which

[18] App. 186a; 270a.

relies on the free flow of information, to conduct itself in obscurity and at the prejudice of persons finding it necessary to utilize that market. Recognizing that the aggregate principal amount of the two bond issues exceeds $125 million, the public interest to be served in speedy disposition of the conflict may fairly be characterized as wide. Where these circumstances, furthermore, occur in the context of two statutes designed to achieve satisfaction of the needs of the public in areas deemed affected with the public interest, particularly with respect to assurance as a matter of precedent that the national interest in adequately financed transportation will be fully served, there is every reason to hasten the decisional process.

2. Pursuant to authorization granted by the Reorganization Court,[19] Respondent has filed with the United States Internal Revenue Service a request for a ruling that, among other things, the New Haven retains the net operating loss carryovers which existed at the time of the transfer of its assets. Effective utilization of such a tax attribute can only be made by a company with substantial earnings. In the case of the New Haven this, as a practical matter, must await completion of the reorganization.

In the final five years of operating the New Haven Railroad, the estate suffered net operating losses as follows: 1964 — $12,103,825; 1965 — $6,068,839; 1966 — $8,306,083; 1967 — $16,096,026; and 1968 — $21,403,181. Under the Internal Revenue Code, the New Haven has already lost the opportunity to utilize that portion of the carryover related to losses in 1964 and, assuming a favorable tax ruling, each successive year that passes before completion of the reorganization further results in the irreparable loss of utilization of a carryover. The loss operations having been imposed upon the New Haven because of the public interest in preserving its

[19] Order No. 581, dated July 15, 1969.

operations and in protecting creditors' interests in railroads, the public interest should be deemed to require the fullest opportunity for the New Haven to offset those losses against future profits.

3. Respondent considers that the public interest in prompt determination of these cases meets the standard contained in Rule 20 for granting a writ of certiorari to a court of appeals before judgment. Wholly apart from Rule 20, moreover, there is precedent for issuance of such a writ.

On appropriate occasions the Court has issued a writ of certiorari to a court of appeals before judgment, even in the absence of imperative public importance for immediate disposition, where another case already before the Court raised essentially the same issues. See *Reid* v. *Covert*, 354 U. S. 1 (1957); *Graham* v. *Goodcell*, 282 U. S. 409 (1930); *Johnson* v. *U. S. Shipping Bd. Emergency Fleet Corp.*, 280 U. S. 320 (1929); *White* v. *Mechanics Securities Corporation*, 269 U. S. 283 (1925).

The common issue in these cases was a question of legal interpretation. In each case the Court had before it a particular legal point which was also present in another case with unrelated parties then pending before one of the courts of appeals. The Court brought up the pending, unresolved case and consolidated it with the case before it in order to have the advantage of the fullest possible exposition of the issues involved.

In the instant case, the Court has been petitioned to issue writs of certiorari in order that there could be consolidated before it cases having identical parties and a single Commission order which presents essentially identical questions which have arisen under different statutes. This raises fundamental legal questions. Hearing both cases together has not only the advantages that consoli-

dation provided in the cases cited above, but also the objective of avoiding the possibility that a separate determination under one statute on identical facts could prejudice or otherwise produce an inequitable result under the other. In view of the number of cases in various stages of determination under Section 5 of the Interstate Commerce Act, expeditious resolution of the legal question dealing with the relationship of Section 5 and Section 77 of the Bankruptcy Act should be considered important to the public interest.

CONCLUSION

In view of the public interest involved, it is respectfully submitted that the petitions of the Bondholders for writs of certiorari before judgment should be granted.

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